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No. 90-1014

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, ET AL., PETITIONERS

v.

DANIEL WEISMAN, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether government accommodation of religion in civic life violates the Establishment Clause, absent some form of government coercion.

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INTEREST OF THE UNITED STATES

The School Committee of Providence, Rhode Island, has for many years permitted principals to include invocations and benedictions in the city's junior high and high school graduation ceremonies. The courts below held that this practice violates the Establishment Clause of the First Amendment, as applied to States through the Fourteenth Amendment.

The United States has a significant interest in this case. The United States is authorized to operate primary and secondary schools for military and foreign service dependents under certain circumstances (10 U.S.C. 7204 (Navy); 20 U.S.C. 241 (federal property); 20 U.S.C. 926 (Defense Department); 22 U.S.C. 2701 (foreign service)) and for Native Americans (25 U.S.C. 271-340). The resolution of this case will bear directly on the operation of these schools.

In addition, the United States conducts numerous public ceremonies in which religion is acknowledged in some manner. Many of these ceremonies – presidential inaugurations, for example – date back to the founding of the Republic. These traditions, which the United States has a profound interest in preserving, could be called into question under the broader implications of the decisions below.

The United States has participated as a party or as amicus curiae in numerous cases arising under the Establishment and Free Exercise Clauses, most recently in *Board of Education of the Westside Community Schools* v. *Mergens*, 110 S. Ct. 2356 (1990), and *County of Allegheny* v. *American Civil Liberties Union*, 109 S. Ct. 3086 (1989). See also briefs amicus curiae filed in *Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); and briefs filed as a party in *United States* v. *Lee*, 455 U.S. 252 (1982), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

STATEMENT

1. Each year, junior and senior high schools in Providence, Rhode Island, hold graduation ceremonies for students and their families. For many years, it has been the custom to invite local members of the clergy to deliver invocations and benedictions at these ceremonies. In advance of the ceremonies, clergy members are provided by the school system with a pamphlet entitled "Guidelines for Civic Occasions" prepared by the National Conference of Christians and Jews. The guidelines recommend that the prayers for such nonsectarian occasions be composed with "inclusiveness and sensitivity." Pet. App. 19a.

This case arose as a result of the June 1989 graduation ceremony conducted at one of the city's junior high schools, the Nathan Bishop Middle School.[1] As in years past, the ceremony took place at the school, and in the course of the ceremony a member of the clergy – on this occasion Rabbi Leslie Gutterman of Temple Beth El of Providence – delivered an invocation and a benediction. Rabbi Gutterman's invocation and benediction both referred to God. Pet. App. 19a-20a & nn. 2-3.

Respondent's daughter, Deborah Weisman, was among the graduating students who attended Nathan Bishop's 1989 ceremony. She is now a freshman at the city's Classical High School. Pet. App. 20a-21a.

2. Daniel Weisman sued petitioners in district court, alleging that the inclusion of invocations and benedictions in graduation ceremonies at the city's public junior high and high school graduation ceremonies violated the Establishment Clause of the First Amendment as applied to the States through the Fourteenth Amendment. The district court entered judgment in favor of Weisman on the basis of stipulated facts and issued a permanent injunction "enjoin[ing] [petitioners] from authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises." Pet. App. 31a.[2]

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[1] Like the city's other public school graduation ceremonies, the Nathan Bishop Middle School ceremony was sponsored by the Providence School Committee and the superintendent of the Providence School Department. The Committee and Superintendent generally leave the planning of each school's ceremony to the school principal, and they permit, but do not require, the ceremonies to include invocations and benedictions. It is the Assistant Superintendent of Schools who provides principals with the "Guidelines for Civic Occasions" pamphlet. Pet. App. 19a-20a; see also Agreed Statement of Facts 3-4, 9-11.

[2] The court had previously refused to issue a temporary restraining order preventing the inclusion of an invocation and benediction at Nathan Bishop's 1989 graduation ceremony. Pet. App. 19a-20a.

Reviewing the challenged practice under *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the court determined that it failed the "second prong of the *Lemon* analysis." Pet. App. 23a. In the court's view, inclusion of a benediction and invocation at graduation ceremonies had the impermissible effect of advancing religion in two ways. First, it "present[ed] a 'symbolic union' of the state and schools with religion and religious practices." *Id.* at 24a. Second, it "convey[ed] a tacit preference for some religions, or for religion in general over no religion at all." *Id.* at 25a. The court viewed its determination that ceremonial invocations and benedictions impermissibly endorse religion as "a foregone conclusion; that is, the reference to a deity necessarily implicates religion." *Ibid.*[3]

The court refused to follow *Stein* v. *Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). In *Stein*, the Sixth Circuit held that invocations and benedictions in public school graduation ceremonies are not per se unconstitutional. The *Stein* court had relied upon *Marsh* v. *Chambers*, 463 U.S. 783 (1983), in which this Court upheld against an Establishment Clause challenge the Nebraska legislature's practice of opening each day's session with a prayer offered by a paid chaplain. The district court here rejected the approach in *Stein*, concluding that the "*Marsh* holding was narrowly limited to the unique situation of legislative prayer" and thus did not apply to similar religious references at graduation ceremonies. Pet. App. 27a. The district court similarly refused to consider the history of including invocations and benedictions in public school graduation ceremonies. The court read *Marsh* as requiring consideration of the history of the challenged practice only when the specific practice was extant when the Republic was founded.

[3] The court found it unnecessary to decide under *Lemon* whether the practice challenged here had a secular purpose and avoided excessive entanglement between government and religion. See Pet. App. 23a.

Since the tradition here was only 160 years old, the court deemed the history of that tradition to be irrelevant. *Id.* at 26a & n.8. The court concluded by indicating that invocations and benedictions would be acceptable, but only if they omitted any reference to a deity. *Id.* at 28a-29a.

3. A divided panel of the First Circuit affirmed. Pet. App. 1a-17a. Writing for the majority, Judge Torruella found nothing to add to the "sound and pellucid opinion of the district court." *Id.* at 2a.

Judge Bownes concurred. Pet. App. 3a-13a. Writing separately, he concluded that the ceremonial invocations and benedictions were impermissible under each part of the three-part *Lemon* analysis. Pet. App. 9a-10a. Like the district court, Judge Bownes dismissed this Court's decision in *Marsh* as inapposite. *Marsh*, according to Judge Bownes, "was based on the 'unique' and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the First Congress approved of legislative prayers." Pet. App. 11a. *Marsh* did not apply here "since free public schools were virtually nonexistent at the time the Constitution was adopted." Pet. App. 11a (quoting *Edwards* v. *Aguillard*, 482 U.S. 578, 583 n.4 (1987)). Unlike the district court, Judge Bownes did not believe that public ceremonial invocations and benedictions would be permissible if they omitted any reference to a deity. Invocations and benedictions, in his view, "are by their very terms prayers and religious." Pet. App. 13a.

Judge Campbell dissented from what he considered "the[] extreme views of [his] colleague[s]." Pet. App. 14a. He did not believe that the Constitution prohibits "message[s] * * * especially suitable for a rite of passage like a graduation, where those present wish to give deeply felt thanks." *Ibid.* Instead, he found that "*Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions," so long as school authorities invited speakers representing a wide range of religious beliefs and ethical philosophies. *Id.* at 16a.

DISCUSSION

The courts below invalidated the benediction and invocation here on the basis of the "effects" test of *Lemon*. In doing so, they refused to consider the history of the ceremonial practice challenged or to assess it in light of other traditional acknowledgements of religion that this Court has sustained, notably in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), and *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). Accordingly, this case raises the question whether the historical tradition of religious references at civic ceremonies—a tradition that reaches back to the time of the Founding—permits such recognition in contemporary settings. Even more fundamentally, it raises the question whether the presumptive applicability of the *Lemon* test to all Establishment Clause challenges should be reconsidered in light of its persistent tendency to invalidate practices with substantial historical sanction.

Since its creation, the *Lemon* test has been the source of widespread confusion and deep division among the lower courts. Its rigid doctrinal framework has, time and again, presented lower federal courts—and this Court—with enormous difficulty in squaring the Nation's tradition of acknowledging forthrightly its religious heritage with the Court's First Amendment doctrine.

Indeed, the decision below has created a split in the circuits with respect to the proper framework for analyzing Establishment Clause challenges to the manifestly benign practice at issue here—a ceremonial invocation and a solemn expression of gratitude for "the legacy of America where diversity is celebrated and the rights of minorities are protected." Pet. App. 20a n.2. In *Stein* v. *Plainwell Community Schools*, 822 F.2d 1406 (1987), the Sixth Circuit embraced the same approach as Judge Campbell in dissent in this case to analyze invocations and benedictions at public school graduation ceremonies. The court in *Stein* determined

that "annual graduation exercises * * * are analogous to the legislative and judicial sessions referred to in *Marsh*." 822 F.2d at 1409. The *Stein* court accordingly indicated that, while the sectarian invocation and benediction involved there were impermissible, nonsectarian acknowledgements of a deity during graduations—such as that involved here—did not run afoul of the Establishment Clause. *Id.* at 1409-1410.

As in this case, each member of the panel in *Stein* wrote separately to endorse a different mode of analyzing this common fact pattern. Chief Judge Merritt viewed the issue as "governed by the * * * principles of [*Marsh*]" alone and did not apply the *Lemon* test. *Stein*, 822 F.2d at 1409. In contrast, Judge Milburn applied *Lemon* but upheld nonsectarian prayer by relying on its ceremonial aspect. 822 F.2d at 1410 (Milburn, J., concurring). The dissenting member of the panel, Judge Wellford, applied *Lemon* but held that even sectarian prayer did not advance religion within the meaning of the *Lemon* test in light of the historical evidence adduced in *Marsh* that the delegates to the Constitutional Convention did not consider such ceremonial prayers as problematic. 822 F.2d at 1416 (Wellford, J., dissenting). This *Lemon*-spawned cacophony is a commonplace among district courts that have been called upon to address the same or similar facts in response to Establishment Clause challenges.[4]

[4] Compare *Grossberg* v. *Deusebio*, 380 F. Supp. 285, 289-290 (E.D. Va. 1974) (inclusion of invocation in public high school graduation ceremony did not violate Establishment Clause) and *Wood* v. *Mount Lebanon Township School Dist.*, 342 F. Supp. 1293, 1294-1295 (W.D. Pa. 1972) (same) with *Lundberg* v. *West Monona Community School Dist.*, 731 F. Supp. 331, 341-346 (N.D. Iowa 1989); *Graham* v. *Central Community School Dist.*, 608 F. Supp. 531, 534-537 (S.D. Iowa 1985) and *Doe* v. *Aldine Indep. School Dist.*, 563 F. Supp. 883, 885-888 (S.D. Tex. 1982). The state courts are also in disarray on the question. Compare *Sands* v. *Morongo Unified School Dist.*, 214 Cal. App. 3d 45, 262 Cal. Rptr. 452 (1989) (upholding invocation at high school graduation on basis of *Marsh*) with *Bennett* v. *Livermore Unified School Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987) (holding that inclusion of an invocation at high school graduation fell afoul of the *Lemon* test).

The uncertainty and confusion stem from the uneasy relationship between reliance upon history—exemplified by this Court's decisions in *Marsh* v. *Chambers* and *Lynch* v. *Donnelly*—and *Lemon*'s three-part test.

The varying approaches are fairly represented by the opinions in this case. Since this case involves a fact pattern that has now divided the circuits and in light of the significance of the issues presented, we believe this case warrants the Court's review. The case would afford the Court an appropriate opportunity to reconsider the application of the *Lemon* test to the attempts to accommodate the Nation's religious heritage in our public life. In our view, the Court should hold that the traditional public acknowledgements of religion at issue here, like those before the Court in *Marsh* and *Lynch*, do not violate the Establishment Clause because they neither establish any religion nor coerce nonadherents to participate in any religion or religious exercise against their will. The Court, we urge, should do expressly what it did implicitly in *Marsh*—jettison the framework erected by *Lemon*'s tripartite analysis in circumstances where, as here, the practice under assault is a non-coercive, ceremonial acknowledgment of the heritage of a deeply religious people.

1. We are not asking this Court to grant review in this case to overrule any of its precedents; indeed, we have no occasion here to question the precise holding of *Lemon* itself. What we do question is the constitutional underpinning and continuing validity of the so-called *Lemon* "test," a formula that has developed a life of its own divorced both from the context of *Lemon* itself and from the constitutional command it seeks to illuminate. Indeed, it is not at all clear that the *Lemon* Court intended its discussion to be an articulation of such a comprehensive "test."[5] And in

[5] Chief Justice Burger's opinion for the Court introduced what has become the *Lemon* test simply by noting that "[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years." 403 U.S. at 612.

seeking explicit reconsideration of the Court's reliance on this test, we are guided by the Court's own expressed "unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch*, 465 U.S. at 679, and the implicit recognition by this Court[6] and the lower courts[7] that the *Lemon* formula is, at least in some circumstances, an unhelpful guide to adjudicating Establishment Clause claims.

Indeed, a majority of the Members of the Court has written to express dissatisfaction with different aspects of the *Lemon* test. See *County of Allegheny* v. *American Civil Liberties Union*, 109 S. Ct. 3086, 3134 (1989) (Kennedy, J., concurring in the judgment and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order"); *Wallace* v. *Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results"); *Aguilar* v. *Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test"); *Roemer* v. *Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) ("I am no more reconciled now to *Lemon I* than I was when it was decided. * * * The threefold test of *Lemon I* imposes unnecessary, and * * * superfluous tests for establishing [a First Amendment violation]"); *Edwards* v. *Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation * * * of the totality of *Lemon* is particularly applicable to the 'purpose' prong").

[6] See, *e.g.*, *Marsh* v. *Chambers*, *supra* (deciding Establishment Clause case without employing *Lemon* test).

[7] See, *e.g.*, *Peyote Way Church of God, Inc.* v. *Thornburgh*, No. 88-7039 (5th Cir. Feb. 6, 1991) (deciding Establishment Clause case without employing *Lemon* analysis); see also slip op. 2208 (referring to "[t]he markedly different approaches the [Supreme] Court takes to answering establishment clause questions").

In our view, the first step in replacing the *Lemon* formula is a recognition that the contemporaneous understanding of the Clause, as reflected in historical practice, must be examined to determine the validity of challenged activities. The Court has already recognized that interpretation of the Establishment Clause must "comport[] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673.[8] Indeed, the Court's "Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic,'" *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 777 n.33 (1973) (quoting *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921)).[9]

In seeking guidance from history, the Court has not limited its search to evidence that the specific activity challenged in a particular case existed at the Founding and was approved of by the Framers. To be sure, when such evidence exists, it has disposed of an Establishment Clause challenge. Thus, the holding in *Marsh* was largely based on the common-sense observation that

> [i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain [to deliver opening prayers] for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended

[8] See also *School Dist.* v. *Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

[9] By the same token, the Court has steadfastly "declined to construe the Religion Clauses" in a manner "that would undermine the ultimate constitutional objective as *illuminated by history*," *Walz* v. *Tax Commissions*, 397 U.S. 664, 671 (1970) (emphasis added).

> the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

463 U.S. at 790.

It is clear from *Lynch* and other decisions, however, that the Court has not hesitated to draw inferences from long-established traditions to approve practices in contemporary settings. In *Lynch*, the Court concluded that the Establishment Clause did not prohibit city officials from including a nativity scene in a holiday display. 465 U.S. at 681-685. In reaching this conclusion, the Court did not limit itself to evidence of how Christmas was celebrated in 1789, but also considered a wide variety of other types of public acknowledgements of religion. *Id.* at 672-678, 686.[10] Many of the examples cited by the Court, in fact, were ceremonial invocations of the deity by public figures, both historic and contemporary, similar to those at issue here. *Id.* at 675 & nn. 2 & 3.[11] In this way, the holding in *Lynch* was broadly informed by the inferences to be drawn from "an unbroken history of official acknowledgment by all three branches of [the] government of the role of religion." *Id.* at 674. See also *McGowan* v. *Maryland*, 366 U.S. 420, 431-434 (1961) (reviewing history of Sunday Closing Laws).

Nonetheless, despite its recognition of the centrality of history, the Court has continued to adhere to the *Lemon* test as its primary guide to analysis. See *Edwards* v. *Aguillard*, 482 U.S. 578, 583 n.4 (1987). The United States

[10] The record in *Lynch* indicated that "at the time of the adoption of the Constitution and the Bill of Rights, there was no settled pattern of celebrating Christmas, either as a purely religious or as a public event." 465 U.S. at 720 (Brennan, J., dissenting).

[11] Thus, contrary to Judge Bownes' suggestion (Pet. App. 11a), consideration of the history of the tradition challenged here was not foreclosed by *Edwards* v. *Aguillard*, 482 U.S. 578 (1987). While the Court in *Edwards* eschewed a historical approach when reviewing public school curricula challenged under the Establishment Clause (*id.* at 583 n.4), that decision is inapposite here.

has previously expressed serious reservations about this approach, because we believe that experience has demonstrated that the *Lemon* test cannot be relied upon as an algorithm capable of resolving all difficult Establishment Clause questions.[12] To the contrary, the *Lemon* test was developed to divine the intended meaning and scope of the Establishment Clause in the setting of government financial aid to plainly religious institutions. Whatever its continuing validity in that specialized context, we believe it is inappropriate to apply the test to other situations in which the intended meaning and scope of the Establishment Clause can be more readily divined from historical sources, such as those described above.

Moreover, the *Lemon* test has spawned persistent confusion in the lower courts, particularly in its application to practices with historical sanction. Indeed, the anomalies that result from treating the *Lemon* test—rather than the historical understanding of the Clause's guarantees—as the touchstone of its jurisprudence are vividly illustrated by this case. In striking down the invocation and benediction at Nathan Bishop Middle School graduation, the court below had to turn a blind eye to the fact that the same invocation and benediction at issue in this case could have been delivered at the opening of Congress or during a presidential inauguration ceremony. See *County of Allegheny* v. *American Civil Liberties Union*, 109 S. Ct. at 3142 n.9 (Kennedy, J., concurring in the judgment in part and dissenting in part).[13] Despite the fact that the benefit to religion

[12] See Brief of the United States at 43-44 in *Board of Education of the Westside Community Schools* v. *Mergens*, *supra*; Brief of the United States as Amicus Curiae at 23-26 in *Lynch* v. *Donnelly*, *supra*.

[13] The most recent inaugural address began with a prayer. *Inaugural Address*, 25 Weekly Comp. Pres. Doc. 99 (Jan. 20, 1989).

conferred by inclusion of religious references at the Nathan Bishop Middle School graduation could hardly be considered on a par with that conferred by their inclusion in ceremonies central to the Nation's public life, the lower court considered it "a foregone conclusion" that the former practice had the "effect of advancing religion" within the meaning of the *Lemon* test and thus was invalid.

Even lower courts that uphold practices similar to those at issue (and so avoid anomalies of the sort described above) face other embarrassments in seeking seriously to apply the *Lemon* test. For instance, in order to assert that such practices do not advance religion, the lower courts are tempted to deny the obvious religious significance of traditional religious references. It counts against both the efficacy and candor of the *Lemon* test that it places judges in the unfortunate position of denigrating religious meaning in order to stave off a *Lemon*-inspired assault on traditional practices.[14]

[14] The other two parts of the *Lemon* test also have substantial defects. The first prong of the test, which focuses on whether a practice has a secular purpose, is not well designed to distinguish between those practices that violate the Establishment Clause and those that do not. For instance, even an establishment of an official church could have and historically often had a secular purpose—the promotion of social stability and cohesion. Moreover, even the kind of secular purpose which the courts have upheld, such as the solemnizing purpose of an invocation, see *Lynch* v. *Donnelly*, 465 U.S. at 692-693 (O'Connor, J., concurring) is wholly dependent on the religious effect of the practice: an invocation with a deistic reference solemnizes precisely because it moves the audience to think of its Creator. An invocation is not simply a call to order. Furthermore, the third prong, which seeks to prevent "entanglement" between church and state, is mocked by the current operation of the test itself: in assessing the degree to which symbols such as a Christmas tree, menorah, and creche express a particular religious faith, courts themselves risk turning into "a national theology board" every holiday season. *Allegheny* v. *American Civil Liberties Union*, supra, 109 S. Ct. at 3146 (Kennedy, J., concurring in part and dissenting in part).

Moreover, we respectfully suggest that application of the *Lemon* test has tended to create anomalies in this Court's jurisprudence as well. In *County of Allegheny* v. *American Civil Liberties Union*, the Court simultaneously held that display of a creche in Pittsburgh violated the Establishment Clause while the display of a menorah in the same city did not. While every Justice purported to apply the *Lemon* test, there were four separate opinions in the case and only two Justices agreed with both holdings. See *County of Allegheny*, 109 S. Ct. at 3086 (opinion of Blackmun, J.); *id.* at 3117 (opinion of O'Connor, J.); *id.* at 3124 (opinion of Brennan, J.); *id.* at 3134 (opinion of Kennedy, J.). The display of the Pittsburgh creche was invalidated despite the fact that four years earlier the Court had upheld the display of a Rhode Island creche situated in the company of Santa Claus and his reindeer. See *Lynch* v. *Donnelly*, *supra*. Such decisions do not appear to be the application of any historically rooted constitutional principle. They reflect, rather, a struggle over a doctrine which is destined to further confuse and divide the lower courts and the Nation itself. Accordingly, we respectfully ask the Court, in the light of both historical understanding and judicial experience, to reconsider the scope and application of the *Lemon* test, at least outside the area whence *Lemon* itself came – financial assistance to plainly religious institutions.[15]

[15] We by no means suggest that the *Lemon* test has led to consistent results even in the public funding area. Quite the contrary. Compare *Meek* v. *Pittenger*, 421 U.S. 349, 367-371 (1975) (state employees may not provide remedial and accelerated instruction, guidance counseling and testing, speech and hearing services in nonpublic schools), with *Wolman* v. *Walter*, 433 U.S. 229, 241-248 (1977) (state employees may provide speech and hearing diagnostic testing (where these provisions of statute severable) within sectarian school; guidance, remedial and therapeutic services may be provided in mobile unit off site of religious school).

2. Should this case be granted plenary consideration, we would argue that the "contemporaneous understanding of [the Establishment Clause's] guarantees," *Lynch*, 465 U.S. at 673, suggests the *Lemon* test should, at least in the area of accommodation of religious heritage in civic life, be replaced by a single, careful inquiry into whether the practice at issue provides direct benefits to a religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences. See *County of Allegheny*, 109 S. Ct. at 3136 (Kennedy, J., concurring in the judgment in part and dissenting in part) (urging a similar test).[16]

We believe that evidence, including that adduced in *Marsh* and *Lynch*, shows that the Framers fully assented to the appearance of non-coercive religious practices in civic life. To focus, as the lower courts have done, on the fact that the specific type of ceremony at issue did not exist when the Constitution was adopted is to blind oneself to the broader truth on which *Marsh* was founded: that public ceremonial acknowledgments of religion were welcomed by the Framers and are deeply rooted in the Nation's heritage.[17] Indeed,

[16] As Justice Kennedy notes in his opinion in *Allegheny*:

> These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

109 S. Ct. at 3136 (concurring in part and dissenting in part).

[17] Indeed, it is difficult to square this Court's precedents regarding the government's properly accommodating attitude toward religion with a view that religious references in public life are as a general matter intolerable for nonadherents. As the Court has recognized, "[i]t has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 760. Such a total separation would clearly require

history suggests that listening to a religious invocation at a civic ceremony was seen not as an establishment of religion by the government but, on the contrary, as an expression of civic tolerance and accommodation to all citizens.[18]

Moreover, acceptance of religious references at civic ceremonies reflects only part of the substantial historical evidence that religious coercion was the essence of what the Establishment Clause was designed to prevent. See *County of Allegheny* v. *American Civil Liberties Union*, 109 S. Ct. at 3135-3138 (Kennedy, J., concurring in the judgment in part and dissenting in part); *American Jewish Congress* v. *City of Chicago*, 827 F.2d 120, 135-137 (7th Cir. 1987) (Easterbrook, J., dissenting); McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). Historical materials suggest that the presence of religion in public life was not generally considered offensive at the time of the Framing and indeed was often welcomed so long as that presence was not coercive and not part of an establishment of an official church.[19]

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an elaborate effort to reshape our traditions—to establish, in effect, irreligion. See also *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 235-236 (1948) (Jackson, J., concurring). The government's proper role, in contrast, has been understood to be one of "*benevolent* neutrality" toward religion in which "there is room for play in the joints," *Walz* v. *Tax Commissions*, 397 U.S. at 669 (emphasis added), room that allows for appropriate recognition of the Nation's religious heritage.

[18] For instance, in addressing concerns that a prayer opening the session of the First Continental Congress would be divisive, Samuel Adams stated that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." C. Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams*, quoted in *Marsh* v. *Chambers*, 463 U.S. at 791-792.

[19] For instance, many of the Nation's founders thought that it was not merely permissible to recognize the role of religion in the Nation's life but necessary to the very preservation of the Nation. George

We recognize that opinions constituting a majority of the Court in the *County of Allegheny* indicated that proof of the coercive nature of a challenged activity was not necessary to demonstrate an Establishment Clause violation. 109 S. Ct. at 3119. (O'Connor, J., concurring). However, as noted above, *Allegheny* was itself an application of the test that we believe should be reconsidered in this area.[20]

Moreover, we agree that Establishment Clause concerns are triggered not only by coercion in the form of direct, legal compulsion, but also in the form of more indirect social

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Washington expressly addressed the issue in his farewell address, itself a ceremonial occasion:

> Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.

Fitzpatrick, *The Writings of George Washington from the Original Manuscript Sources 1745-1799, Farewell Address*, at 214, 229. See also Northwest Ordinance, Article III (1787) ("*Religion*, morality, and knowledge being necessary to good government, schools and means of education shall ever be encouraged.") (emphasis added).

[20] In any event, this Court's decisions do not preclude taking the absence of coercion into account as a relevant, if not predominant factor, in determining whether an activity advances religion. Indeed, the intention underlying an activity—on the one hand, to encourage adherence to religious tenets or, on the other, simply to acknowledge the existence of beliefs important to the community—will directly bear on whether the activity "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). See also *Board of Education of the Westside Community Schools* v. *Mergens*, 110 S. Ct. 2356, 2372 (1990) (O'Connor, J.).

coercion. For instance, we recognize that the special character of the public school setting has heightened this Court's sensitivity to subtle forms of coercion. See, *e.g.*, *Engel* v. *Vitale*, 370 U.S. 421, 430-431 (1962). We do not believe, however, that graduation ceremonies pose a risk of coercion. Such ceremonies typically occur but once a year. They are addressed not to children alone but to families as a whole which are, as the *Stein* court noted, a natural bulwark against any coercion. Indeed, children in the family setting may hear similar invocations and benedictions at inaugurals and other public ceremonies. In short, whatever special concerns about subtle coercion may be present in the classroom setting—where inculcation is the name of the game—they do not carry over into the commencement setting, which is more properly understood as a civic ceremony than part of the educational mission.

We also recognize that modern government, for better or worse, has a far more substantial presence in the daily lives of its citizens than did the government of 1789, and thus may be capable of creating a pervasive atmosphere of conformity without resort to direct legal compulsion. Accordingly, Establishment Clause jurisprudence must remain sensitive to the manner in which new forms of governmental power could lead to indirect coercion.

Viewed in the framework we would urge this Court to adopt, the practice at issue here clearly does not violate the Establishment Clause, because it does not coerce religious exercise or bring to bear other forms of compulsion to conform. Indeed, Rabbi Gutterman's invocation and benediction, with their reference to God, do not directly or indirectly compel nonadherents to change their beliefs, but merely respect the religious heritage of the community.

We do not mean to suggest that the foregoing approach to Establishment Clause cases will necessarily make the requisite inquiry less difficult; what we do believe is that it

will better ensure that the "complicated process of constitutional adjudication" is not reduced to "a deceptive formula." *Kovacs* v. *Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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